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No. 98-450

In the

Supreme Court of the United States

October Term, 1998

MARTIN CROMARTIE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1253 confer appellate jurisdiction to review a district court's interlocutory approval of an interim redistricting plan over the opposition of plaintiffs who did not seek to enjoin use of the interim plan?

2. Assuming the approval of an interim redistricting plan is the equivalent of a denial of temporary injunctive relief, does an actual case or controversy exist over the one-time use of such a plan after the fact of the election plaintiffs sought to enjoin?

3. Did the district court abuse its discretion by allowing the State's 1998 congressional elections to go forward under an interim redistricting plan where plaintiffs opposing the use of the interim plan failed to meet their burden of showing a likelihood of success on the merits and the existence of irreparable harm?

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MARTIN CROMARTIE, *et al.*,

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Intervenor-appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Defendant-appellees, the Governor and other officials of the State of North Carolina, move the Court to dismiss the appeal by plaintiff-appellants, Martin Cromartie, *et al.*, from the Order of the United States District Court for the Eastern District of North Carolina, dated June 22, 1998, which allowed the State's 1998 congressional elections to proceed under an interim redistricting plan, on the grounds that appellants have failed to present an appealable or justiciable issue for review by

this Court or, in the alternative, to affirm the order on the grounds that appellants have failed to raise a substantial question not previously decided or meriting review by this Court.

STATEMENT OF THE CASE

This appeal is the fourth application to this Court this decade seeking review of North Carolina's congressional redistricting efforts. In *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*)[1], this Court held that plaintiffs had stated an "analytically distinct claim" under the Equal Protection Clause "by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race and that the separation lacks sufficient justification." *Id.* at 652, 658. The case was remanded for trial. On appeal after trial, this Court in *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*)[2], struck down the 1992 plan holding that District 12 was drawn predominantly on the basis of race and did not satisfy strict scrutiny because it

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[1] The plaintiffs in *Shaw I* challenged Districts 1 and 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") as an unconstitutional racial gerrymander. Their claim was dismissed by a 2-1 vote of the district court. 509 U.S. at 638.

[2] The three-judge panel, with one judge dissenting, held that the 1992 plan "did classify voters by race, but that the classification survived strict scrutiny and therefore did not offend the Constitution." 517 U.S. at 901-02.

was not narrowly tailored.[3] *Id.* at 907, 918. The case was remanded for further proceedings.

Shortly after *Shaw II* was decided, the initial *Cromartie* plaintiffs filed this action alleging that District 1 of the 1992 plan was an unconstitutional racial gerrymander.[4] The case was stayed pending the remand proceedings in *Shaw*. In the meantime, the *Cromartie* plaintiffs joined the plaintiffs in *Shaw* and filed an amended complaint in that case challenging District 1 in the 1992 plan and sought to enjoin conduct of the 1996 elections under the 1992 plan. The *Shaw* court allowed the impending 1996 elections to proceed, but directed the State to submit a new plan by April 1, 1997, for use in future elections.

The North Carolina General Assembly enacted the 1997 congressional redistricting plan ("the 1997 plan") to cure the constitutional defects identified by this Court in *Shaw II*, and submitted it to the *Shaw* panel for approval. The *Shaw*/ *Cromartie* plaintiffs objected to the 1997 plan, but disclaimed any standing to challenge the plan because none of them lived within the boundaries of District 12. The *Shaw* court approved the 1997 plan on September 12, 1997, ruling the plan was in conformity with constitutional requirements, and authorized the

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[3] The Court held, however, that it lacked jurisdiction to address the constitutionality of District 1 because none of the plaintiffs resided in that district.

[4] The initial *Cromartie* plaintiffs, all residents of District 1, consisted of Martin Cromartie, Thomas Chandler Muse, and another plaintiff who has since dismissed her claim.

State to proceed with elections under it in 1998.[5] No appeal was taken from that order.

Shortly thereafter, the stay in this case was dissolved, and two of the original *Cromartie* plaintiffs (Cromartie and Muse) and four residents of District 12 filed an amended complaint on October 17, 1997, challenging Districts 1 and 12 in the 1997 plan.[6] The case then was assigned to a three-judge panel consisting of one judge who had served on the *Shaw* three-judge panel and two new judges. On January 30, 1998, four days before the close of the candidate filing period for the 1998 elections, the *Cromartie* plaintiffs moved for a preliminary and permanent injunction; they moved for summary judgment several days later. Brief oral arguments were heard by the *Cromartie* court on March 30, 1998; three days later, April 3, 1998, the court, with one judge dissenting, entered an order which granted the *Cromartie* plaintiffs' motion for summary judgment, declared District 12 in the 1997 plan unconstitutional, and permanently enjoined the State from conducting any elections under the 1997 plan.[7] The State noticed an appeal to this Court, which is now pending. *See*

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[5] Because the enactment of the 1997 plan substantially altered Districts 1 and 12, the court dismissed the *Shaw/Cromartie* plaintiffs' challenge to District 1 in the 1992 plan as moot.

[6] The four District 12 plaintiffs added to the complaint were R. O. Everett, J. H. Froelich, James Ronald Linville and Susan Hardaway. The complaint was amended again later to add District 1 residents Robert Weaver and Joel K. Bourne.

[7] The court denied summary judgment as to District 1.

Hunt v. Cromartie, No. 98-85.[8] Because the 1997 election was already in full swing, and the primaries were only a few weeks away, the State sought a stay of the injunction from the district court and this Court. Both applications were denied and the 1998 congressional primaries were not held with the State's other federal and state primary elections on May 5, 1998.

The district court allowed the State 30 days to redraw its congressional plan to correct the defects it had found in the 1997 plan. On May 21, 1998, the General Assembly, by bipartisan vote, enacted the 1998 interim congressional redistricting plan ("the 1998 interim plan") and submitted it to the court for approval.[9]

The *Cromartie* plaintiffs immediately filed their opposition and objections to the 1998 interim plan, asserting that it is an improper remedy because it does not eliminate all "vestiges" of the original constitutional violations.[10] The State responded to

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[8] Probable jurisdiction was noted on September 29, 1998. The State appellants' brief on the merits was filed with the Court on November 10, 1998; the *Cromartie* appellees' brief on the merits is due on December 8, 1998; and any reply brief is due December 29, 1998. Oral arguments are set for January 20, 1999.

[9] The plan was adopted by the General Assembly effective for the years 1998 and 2000, unless this Court reverses the district court decision holding the 1997 plan unconstitutional.

[10] In support of their objections, plaintiffs filed the affidavit of their counsel Martin B. McGee, attached to which were demographic fact sheets on six Forsyth County precincts and maps depicting demographic and registration data for Forsyth and Mecklenburg counties (two of the five counties included in new District 12) as well as a map showing side by side

plaintiffs' objections both on the legal merits and factually.[11] On June 22, 1998, the district court entered an order tentatively approving the 1998 plan on an interim basis. Jurisdictional Statement ("JS") at 1a-5a. Based on the materials presented by the parties, the district court concluded that race did not predominate in redrawing District 12 and that the primary goal of the legislature in drawing the 1998 interim plan was to eliminate the specific concerns with the 1997 plan which had been identified by the court. *Id.* at 3a.[12]

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the 1992, 1997 and 1998 plans.

[11] In support of the 1998 interim plan, the State filed the affidavits of the principal architects of the remedial plan: Senator Roy A. Cooper, III, and Representative W. Edwin McMahan, chairmen of the State Senate and House redistricting committees, and Gerry Cohen, the Director of the General Assembly's Bill Drafting Division. These affidavits explained the goals guiding the State's redistricting efforts, which included maintaining the six-Democrat, six-Republican balance of the delegation, keeping incumbents in separate districts and preserving the cores of their districts. The overriding goal, however, was to eliminate the constitutional defects identified by the *Cromartie* district court when it found District 12 in the 1997 plan unconstitutional. The affidavits describe in detail how line-by-line each of the concerns expressed in the court's opinion was addressed. These affidavits also included mathematical measures of compactness and other demographic data analyzing the improvements and revisions made to the plan. The court was also provided a copy of the State's § 5 preclearance submission, which comprises a complete legislative history of the plan's enactment, including transcripts of the public hearing, committee meetings and floor debates.

[12] Specifically, the court found that the 1998 interim plan reduced the division of counties and cities and reassigned heavily democratic precincts where the court had found the divisions and assignments in the 1997 plan were based on racial lines. It also found the shape of District 12 was made more regular, the number of counties encompassed in the district was reduced and the total African-American population in the district was

Because the revisions to District 12 "successfully addressed" the concerns the court had identified when it entered a permanent injunction against the 1997 plan, and "the revised plan is not in violation of the United States Constitution," the court authorized the State to proceed with elections under the 1998 interim plan.[13] *Id.* at 1a. However, the plan was approved only for the 1998 elections and the court reserved "jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge." *Id.* at 5a. The parties were directed to prepare for trial.[14] The Cromartie plaintiffs gave notice of appeal from this order and filed the instant Jurisdictional Statement. No stay was sought by the plaintiffs to halt the 1998 congressional primaries or general election.

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reduced to 35 percent. JS at 4a.

[13] After enjoining the May 5, 1998 congressional primaries, the court entered an order on April 21, 1998, establishing a truncated election schedule to begin no later than July 6, 1998. The schedule provided for a candidate filing period from July 6 to July 20; a shortened absentee balloting period; and stand-alone congressional primary elections on September 15 - when no other state or federal elections were being held. Because of the proximity of the November 3, 1998, general election, the court's election schedule did not provide for primary run-offs (second-primaries) otherwise provided by State law.

[14] After this Court noted probable jurisdiction of the State's appeal of the order permanently enjoining elections under the 1997 plan, the parties jointly moved the district court to stay discovery and all further proceedings in the case pending this Court's decision. A stay was entered on October 19, 1998.

ARGUMENT

Plaintiffs' appeal of the lower court's interlocutory order approving the 1998 interim plan for purposes of conducting the State's 1998 congressional elections is premature and presents no appealable or justiciable issue for review; at the very least, it fails to raise a substantial question not previously decided or meriting review by this Court.

I. PLAINTIFFS' APPEAL DOES NOT PRESENT AN APPEALABLE OR JUSTICIABLE ISSUE.

Plaintiffs' appeal of the district court's interlocutory order allowing the State's 1998 elections to proceed may be dismissed on two alternative grounds: first, there is no appellate jurisdiction pursuant to 28 U.S.C. § 1253, which limits review to three-judge court orders granting or denying injunctive relief; and second, the appeal does not present a justiciable issue under Article III of the Constitution which requires an actual case or controversy.

A. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE.

At the outset, there is nothing in the record to support plaintiffs' claim that they are appealing from the denial of a temporary or permanent injunction against the 1998 interim plan. When the General Assembly enacted a new redistricting plan and submitted it to the Court for approval, plaintiffs simply "informed" the district court of their opposition and objections to the revised 1998 redistricting plan and asked the

court to "disapprove" or "reject" the plan and proceed to draw one of its own.[15] They never moved for a preliminary injunction.

The statute which provides for appellate jurisdiction from decisions by three-judge courts, 28 U.S.C. § 1253, allows direct appeal to this Court only from an order granting or denying preliminary or permanent injunctive relief and must be strictly construed. *See In re Slagle*, 504 U.S. 952 (1992) (White, J., concurring in order dismissing certificate) (Court construes jurisdiction over three-judge decisions narrowly); *Mitchell v. Donovan*, 398 U.S. 427 (1970) (three-judge court legislation, 28 U.S.C. § 1253, is not to be construed liberally). In this case, there is no appellate jurisdiction for review of the district court's interlocutory order which did no more than tentatively approve the 1998 interim plan and allow elections to proceed. Because, plaintiffs did not request injunctive relief, the court did not deny such relief, and the appeal can be dismissed on this ground alone.

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[15] Plaintiffs submitted one alternative plan to the court and also endorsed a plan filed by an independent group.

B. THERE IS NO ACTUAL CASE OR CONTROVERSY.

Appellate jurisdiction exists in this case only if the court's order rejecting plaintiffs' opposition and objections to the 1998 interim plan is treated as the functional equivalent of a denial of preliminary injunctive relief.[16] Assuming, however, that the court's rejection of plaintiffs' opposition to the plan is appealable, the district court approved the interim plan only for the 1998 congressional elections. JS at 5a. The elections already have been held under the plan so there remains no case or controversy over enjoining the 1998 elections.

It is a fundamental principle that under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Raines v. Byrd*, 521 U.S. 811, ___, 117 S. Ct. 2312, 2317 (1997); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). To invoke the jurisdiction of the court, a litigant must show an actual injury that is "likely to be redressed by" a favorable judicial decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984). This case or controversy requirement must exist at all stages of federal proceedings, trial and appellate, and not simply at the date the action is initiated. *Deakins*, 484 U.S. at 199. A ruling that will not provide any relief to the prevailing party ignores the duty of the courts "to

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[16] Plaintiffs cannot establish appellate jurisdiction by characterizing the court's interlocutory order as a denial of a permanent injunction. Under 28 U.S.C. § 1253, direct appeal from interlocutory orders are limited to granting or denying preliminary injunctions; that section does not authorize direct appeal from interlocutory orders denying permanent injunctions. *Goldstein v. Cox*, 396 U.S. 471, 478 (1970).

decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6 v. Missouri*, 361 U.S. 363, 367 (1960) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

In the instant case, enjoining the 1998 election is a moot question and a favorable judicial decision cannot provide the temporary relief sought. As a practical matter, moreover, there is no reason for this Court to rebalance - after the fact of the 1998 elections - the equities regarding the grant or denial of preliminary injunctive relief; especially in a case where the lower court's ruling does not rest on any legal issue or conclusion that will not be fully re-examined in the pending trial proceedings. The order appealed from is interlocutory in nature and the plaintiffs will have a full opportunity to challenge the 1998 interim plan and to present their factual and legal claims on a complete record. For this reason, plaintiffs have failed to present a justiciable issue for review and their premature appeal should be dismissed.

II. PLAINTIFFS' APPEAL OF THE COURT'S INTERLOCUTORY ORDER DOES NOT PRESENT A SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED OR MERITING REVIEW.

Plaintiffs' appeal from the district court's interlocutory order allowing elections to go forward under the 1998 interim plan does not present a substantial question not previously decided by this Court in other, similar redistricting cases. This

makes further argument or review unnecessary and the district court's order should be affirmed by this Court. The order is appealable only if it is treated as the functional equivalent of the denial of a preliminary injunction.[17] So treated, unquestionably the court did not abuse its discretion by denying plaintiffs' request. The lower court's decision correctly applied existing precedent when it appr ed the 1998 interim plan. Plaintiffs are asking this Court to ond-guess the lower court's balancing of the equities, which, in this case, clearly favored holding an election under the interim plan.

A. Standards For Granting Or Denying A Preliminary Injunction.

Under the circumstances of this case, plaintiffs' interlocutory appeal of the denial of a preliminary injunction cannot reach the question of the constitutionality of the 1998 interim plan, a question still to be addressed below by a trial on the merits in the event the 1997 plan is not upheld. *See Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316-17 (1940) (court committed serious error ruling on the constitutionality of a state statute upon a motion for temporary injunction). Instead, the district court's order must be reviewed under preliminary injunction standards. The grant or denial of a preliminary injunction falls within the sound discretion of the

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[17] It is clear, based on its retention of jurisdiction, that the court did not intend its order to be a final decision on the merits. A decision on the merits, and hence a decision on the constitutionality of Districts 1 and 12 as well as the issuance of a permanent injunction, has been left for future proceedings by the lower court on a complete record. *See* JS at 5a.

district court, and appellate review by this Court of preliminary injunction determinations is solely for abuse of discretion. *See, e.g., Brown v. Chote*, 411 U.S. 452, 457 (1973) (In reviewing preliminary injunction request, "this Court may only consider whether issuance of the injunction constituted an abuse of discretion."); *United States v. Corrick*, 298 U.S. 435 (1936) (same). *See also Mayo*, 309 U.S. at 317 (1940) (issue presented on appeal from an interlocutory order is restricted to the question whether "the court [has] abused its discretion in granting or refusing an injunction").

The award of a preliminary injunction enjoining a state's redistricting plan is an extraordinary remedy, as evidenced by the federal statute requiring the convening of a three-judge court in cases such as this. The federal statute requiring the convening of a three-judge court was intended to ensure that a state enactment "not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury." *Mayo*, 309 U.S. at 318-19. In determining whether the far-reaching power of a preliminary injunction is clearly demanded, the Court must balance two relevant factors: (1) the plaintiffs' possibility of success on the merits, and (2) the possibility of irreparable injury absent interlocutory relief. *Brown*, 411 U.S. at 456. *See also Withrow v. Larkin*, 421 U.S. 35, 43, 45 (1975) (question for the district court was whether the challenge to the constitutionality of the "statute has a high likelihood of success" and enforcement "would inflict irreparable damages upon the complainants"); *Mayo*, 309 U.S. at 316 (question before the Court "was whether the showing made raised serious questions, under the federal Constitution"

and "disclosed that enforcement of the act . . . would inflict irreparable damages upon the complainants").

In the present appeal, one question the plaintiffs ask the Court to address is whether the district court should have placed the burden on the State to prove that race did not predominate in the drawing of the 1998 interim plan. This framing of the issues is misdirected for two reasons. First, based on the explicit language of the district court's order, no burden was assigned to either party to satisfy the predominance test, although the factual findings and legal conclusions in the court's order obviously are dependent on the plenary evidence presented by the State. Second, to the extent plaintiffs' objection to the plan is the functional equivalent of a preliminary injunction request, the burden of establishing the likelihood of irreparable harm and of success on the merits rested with the plaintiffs. *Mayo*, 309 U.S. at 316.

B. The District Court Correctly Applied Established Redistricting Precedent In Approving The 1998 Interim Plan.

The issues plaintiffs seek to raise in this interlocutory appeal previously have been decided by this Court in similar equal protection redistricting cases. For this reason, the district court's decision, which correctly applied this Court's precedents, should be affirmed. Stated in the context of the denial of a preliminary injunction, plaintiffs failed to meet their burden to show a likelihood of success on the merits and the district court did not abuse its discretion by approving the 1998 plan on an interim basis until further proceedings can be held

on a complete record. *See Withrow*, 421 U.S. at 46 (abuse of discretion to issue preliminary injunction when it is unlikely the party would ultimately prevail on the merits).

The legal principles governing the proper role of the courts in reviewing remedial redistricting plans are well established and were followed by the lower court. *See* JS at 2a-3a. This Court has long adhered to the principle that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). *See also Lawyer v. Department of Justice*, 421 U.S. 567, ___, 117 S. Ct. 2186, 2193 (1997) (when a state takes the opportunity "to make its own redistricting decisions," "the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law.") The role of the courts in this inherently legislative process is simply to ensure that, if there is a constitutional violation, that violation is corrected; otherwise, the court must defer to a state's legislative and political judgment. A "State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Wise*, 437 U.S. at 540 (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966)). The court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights - that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *Upham v. Seamon*, 456 U.S. 37, 42 (1982).

Plaintiffs, in advancing a "vestiges" of *de jure* segregation theory, would add an entirely new factor to the redistricting calculus. They would have this Court hold that a newly enacted redistricting plan which meets the demands of the Equal Protection Clause nevertheless remains unconstitutional if it evolved from or is in anyway related to a prior redistricting plan. According to plaintiffs' theory, a state formulating a new redistricting plan would have to start from scratch, since a plan bearing any resemblance to a previous unconstitutional plan would invariable contain "vestiges" of the invalid plan. This concept has not previously been adopted by this Court in its redistricting jurisprudence and conflicts squarely with the strong obligation of the courts to respect legislative policies and choices.

Plaintiffs' "vestiges" theory also directly contravenes the directions this Court has given to lower courts forced to take on the task of drawing remedial redistricting plans. If the district court had drawn the 1998 plan itself, it would have been required to do precisely what plaintiffs contend the State cannot do - adhere as closely as possible to the legislative choices not affected by the constitutional violation. This Court has repeatedly taken lower courts to task for imposing remedial plans which rejected or ignored valid legislative choices reflected in previous plans stricken as unconstitutional. *See, e.g., White v. Weiser*, 412 U.S. 783, 796 (1973) (district court erred when it chose alternative Plan C rather than Plan B, which was virtually identical to stricken plan except for changes necessary to cure constitutional violations, because it most closely resembled state's preference); *Upham*, 456 U.S.

at 43 (court may make only those changes *necessary* to cure defect and is not free "to disregard the political program" of the state).

Indeed, plaintiffs' novel "vestiges" theory has been implicitly rejected by this Court in a similar racial gerrymandering context. In *Lawyer*, Florida's new Senate District 21 was approved even though it was based on and retains the core of the prior unconstitutional district, including a substantial minority population. 117 S. Ct. at 2191-92, 2195. Similarly, in Texas, on remand from *Bush v. Vera*, 517 U.S. 952 (1996), when the district court imposed its own interim remedy, the plan merely modified the three congressional districts that had been determined to be racial gerrymanders and other adjoining districts only so much as to cure the defects of the gerrymandered districts. *See Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996).[18]

At this interlocutory stage of the proceedings, plaintiffs ask this Court to overturn its longstanding jurisprudence governing the review of remedial redistricting plans and substitute in its place principles developed to dismantle unlawful dual school systems and convert them to unitary systems. *See, e.g., Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991) These doctrines are irrelevant to the *Shaw/Miller* predominance inquiry. Moreover, the district court was bound

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[18] When the Texas legislature failed to enact a new redistricting plan, the same court ordered that its interim plan remain in place as the permanent remedy. *Vera v. Bush*, 980 F. Supp. 251 (S.D. Tex. 1997).

by this Court's admonition that when a federal court is called upon to judge the constitutionality of a state's redistricting legislation in the face of a racial gerrymandering challenge, the good faith of a state legislature must be presumed. *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

The district court's conclusion that race was not the predominant factor in redrawing District 12 in the 1998 interim plan, *see* JS at 3a, is fully supported by the State's evidentiary showing in support of the plan. The State fully remedied the alleged constitutional violation by specifically addressing each of the concerns noted by the court when it struck down the 1997 plan. *See* JS at 4a. No more can be required. Adoption of plaintiffs' "vestiges" theory necessarily would have required the district court to reject established redistricting principles. Hence, it was not an abuse of discretion by the district court to approve the conduct of elections under the 1998 interim plan. Plaintiffs' reliance on inapposite school segregation case law failed to establish a likelihood of success on the merits which could have justified temporarily enjoining elections under the 1998 interim plan.

C. The District Court Properly Balanced The Equities By Allowing The 1998 Elections To Proceed.

Although not specifically addressed by the district court in its order approving the conduct of elections under the 1998 interim plan, the lack of irreparable harm to plaintiffs is, as a matter of law, an insurmountable barrier to their claim for injunctive relief. Harm is only irreparable when it cannot be

redressed by a legal or an equitable remedy following a trial. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("the Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."); 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL 2D § 2948.1 at 144,149 (2d ed. 1995) ("Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.") The district court has full remedial powers to fashion relief in the election context if, after a full hearing, it concludes the 1998 interim plan violates the constitution. In appropriate circumstances, relief may be given by means of a special election, *Ketchum v. City Council of Chicago, Ill.*, 630 F. Supp. 551, 565 (N.D. Ill. 1985), or by deferring relief to the next election cycle. *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 407 (W.D. Va. 1991). *See also Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F. Supp. 751, 763 (E.D.N.Y. 1997) (preliminary injunction to stop election denied because any injury plaintiff would suffer could be remedied after trial).

The irreparable harm to the defendants and the public interest in this case weighed heavily against the grant of injunctive relief to the plaintiffs. At the time plaintiffs' objection was filed, May 27, 1998, the district court was faced with an impending drop-dead date of July 6, 1998, by which time a redistricting plan had to be in place if North Carolina was going to elect congressional representatives in the 1998

general elections.[19] Faced with the prospect of not holding the State's 1998 congressional elections on time, the court correctly dismissed the plaintiffs' opposition to the 1998 interim plan and ordered the elections to go forward under the plan duly enacted by the State's legislature.

It is well settled that allowing elections to proceed in an orderly and timely manner is an important public interest. *See, e.g., Leblanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1249 (S.D. N.Y. 1991) (any scheduled election "is, without question, in the public interest.") Allowing elections to proceed in an orderly and timely manner is so important an interest of the public that courts often allow elections to proceed even under plans which have already been held unconstitutional or which are otherwise invalid. *See, e.g., Cosner v. Dalton*, 522 F. Supp. 350, 363 (E.D. Va. 1981) ("Certification of candidates, ballot preparation, and a host of other election mechanics must be undertaken promptly if the existing schedule is to be followed."); *see also French v. Boner*, 771 F. Supp. 896, 902 n.8 (M.D. Tenn. 1991) (collecting cases where courts have withheld immediate injunctive or other equitable relief that would affect an impending election). This Court has cautioned the district courts in awarding or withholding relief in redistricting cases to consider the proximity of the forthcoming election and to "endeavor to avoid a disruption of the election process which might result from requiring precipitate changes

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[19] Federal law, 2 U.S.C. § 7, requires all the states' elections for representatives to Congress to be held the Tuesday after the first Monday in November in even numbered years. In 1998, election day was November 3, 1998.

that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The lack of irreparable harm to these plaintiffs and the urgent need to put a redistricting plan into place fully supports the district court's decision to reject plaintiffs' opposition to holding elections under the 1998 interim plan - a plan the court tentatively had approved as constitutional.

The questions before this Court in this appeal are not - as posited by plaintiffs - whether the 1998 interim plan is a constitutional remedy and which party bears the burden of establishing the adequacy of a remedial redistricting plan, but whether the district court abused its discretion by denying plaintiffs' objections and ordering the State to conduct the 1998 elections under a redistricting plan approved by the court on an interim basis. Plaintiffs failed to make a showing of irreparable injury or a likelihood of success on the merits which requires this Court to second-guess the district court's balancing of these factors. The circumstances of this case favored the entry of an order allowing the State to conduct its 1998 congressional elections and the district court's interlocutory denial of temporary relief to the plaintiffs by rejecting their opposition and objections to the interim plan must be affirmed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal or, in the alternative, summarily affirm the decision of the court below.

Respectfully submitted,

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